Filed 9/30/03 Estate of Cota CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

Estate of LOUIS G. COTA, JR., Deceased.	B156586 (Los Angeles County Super. Ct. No. BP067154)
KENNETH E. NAUGHTON, as Special Administrator and Executor, etc., Petitioner and Appellant, v. WELLS FARGO BANK et al., Objectors and Respondents.	

APPEAL from an order of the Superior Court of Los Angeles County, R. Gary Klausner, Judge. Reversed.

Robert L. Kern for Petitioner and Appellant.

Barton, Klugman & Oetting and Charles J. Schufreider for Objector and Respondent Wells Fargo Bank.

Kester & Quinlan and Steven L. Kester for Objector and Respondent World Savings Bank.

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Kenneth Naughton (Naughton), the special administrator of the estate of decedent Louis G. Cota, Jr. (Cota) and executor of Cota's will, appeals from a January 31, 2002 order denying without prejudice a petition Naughton filed on May 4, 2001, seeking various orders, including an order for recovery of assets belonging to Cota or his estate from Donna Johnson (Johnson)[1] and her daughter Cheryl Johnson; an order that Johnson account for all assets and funds received from Cota; and an order to declare null and void any purported conveyances, encumbrances, or liens against real property which stood in Cota's name during the last two years of his life. We reject the argument of respondents Wells Fargo Bank and World Savings Bank that the order is not appealable and conclude that it constitutes an appealable order under Probate Code section 1300, subdivision (k). We also agree with Naughton's claim that reversal is warranted because the apparent loss by the clerk's office of the original filed supplement to the petition resulted in a ruling against Naughton.

FACTUAL AND PROCEDURAL BACKGROUND

Cota, a widower with no children, died in April 2001 at the age of 80. In late 1998, Cota met Johnson, a widow, who was employed as a customer service representative at World Savings Bank, where Cota had several accounts. According to Naughton, Johnson's position at the bank entailed assisting the elderly. According to Johnson, she and Cota lived together in his South Gate home from March or April 1999 until his death; they had discussed plans to be married in May or July 2001. Naughton claimed that Johnson acted as Cota's financial adviser, but Johnson denied ever acting as such; instead, she would reply to Cota's comments about gifts or financial transactions "in the same way as a spouse might comment to another spouse speaking of gifts to myself or third persons."

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[1] Johnson has not appeared on appeal.

Johnson admits that Cota paid their living expenses while they were living together, that Cota paid off a second trust deed on her home on Wisconsin Avenue in South Gate, and that in September 1999 Cota transferred to her a parcel of real property in La Mirada. Johnson admitted in these proceedings that she owned the Wisconsin Avenue property and held title to the La Mirada property. Naughton's verified petition alleged that Cota's signature on the September 1999 deed transferring the La Mirada property to Johnson was a forgery.[2]

In August 1998, Cota established a revocable trust and named Naughton, a nephew of his predeceased wife, as the successor trustee upon his death. The trust assets included, among others, bank accounts at World Savings Bank and Wells Fargo Bank, Cota's home, and parcels of residential property in South Gate and Compton. Upon Cota's death, the trustee was directed to distribute the trust property in equal shares to Cota's sisters, nephews, nieces, and the nephews and nieces of his predeceased wife. Cota amended the trust in April 1999 and executed another substantially similar trust document and a pour-over will in September 2000. The pour-over will devised the residue of his estate to the revocable trust and named Naughton as executor.

In February 2001, Cota executed another revocable trust document, which for the first time named Johnson as one of his beneficiaries and directed the trustee to distribute $20,000 to her upon his death. The schedule of assets for the February 2001 trust document specifically listed bank accounts and other items of personal property but only one parcel of real property, Cota's South Gate home. After Cota's death in April 2001,

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[2] The La Mirada property is not listed as an asset in any of the trust documents executed by Cota, and it is unclear whether Cota held title to the property or only a security interest in it. Naughton's probate petition alleges that the decedent's funds "were used to pay off the loans upon the houses of Ms. Johnson and her daughter and . . . the decedent believed that these transactions were secured (as he received a deed transferring title to one of the parcels of property). Ms. Johnson has produced a deed purporting to show that the decedent 'deeded back' this property held as security . . . ."

the original pour-over will and many of his financial documents and bank records were missing from his home.

On April 19, 2001, Naughton commenced the instant proceeding by filing petitions for probate of Cota's will and for letters of special administration. The petitions stated that "[a]ll present assets are in trust" but claimed that "[p]robate apparently is needed to pursue assets taken from decedent during his lifetime."

On May 4, 2001, Naughton filed two petitions. One petition sought to confirm his authority as successor trustee of Cota's trust and for a determination that Cota's assets were subject to the provisions of the trust (hereinafter referred to as the petition concerning trust assets). The petition concerning trust assets is not the subject of this appeal. Rather, this appeal concerns the second petition which named Johnson and her daughter as respondents. The latter petition (hereinafter referred to as the petition for recovery of property) sought to recover from Johnson and her daughter, or to impose liens on, all funds and assets they allegedly obtained from Cota within three years of his death. The petition for recovery of property alleged that Johnson and her daughter obtained approximately $300,000 from Cota by undue influence and also that Cota's funds were used to pay off encumbrances on the La Mirada and Wisconsin Avenue properties. Naughton sought an order determining that Cota's estate was entitled to recover title to the two properties or to impose equitable liens on them.

After a hearing on May 31, 2001, Cota's pour-over will was admitted to probate and Naughton was appointed executor of the will. On June 4, 2001, Naughton applied for restraining orders and a preliminary injunction to order Johnson to disclose the whereabouts of all funds and property she allegedly wrongfully appropriated from Cota and to restrain World Savings Bank and Wells Fargo Bank from transferring or otherwise alienating any such assets. Naughton submitted copies of canceled checks showing that in the last three years of his life, Cota wrote checks to Johnson totaling $573,700 from his accounts at Wells Fargo Bank. Naughton also claimed that on one day in October 1999, Cota withdrew over $140,000 from two of his accounts at World Savings Bank and these funds may have been transferred to Wells Fargo Bank and then to Johnson. In a June 4,

2001 declaration, Johnson admitted that Cota "signed various checks in my favor," which she deposited into her accounts at World Savings Bank and Wells Fargo Bank, but claimed that she returned the bulk of this money to him in cash, "which he used in various fashions," including for medical equipment, prescriptions, home furnishings, and traveling expenses. Johnson also retained monies for the payment of living expenses for Cota and herself while they lived together.

On June 4, 2001, the court granted Naughton's application for a restraining order and set a hearing on the application for a preliminary injunction. On June 11, 2001, Johnson filed responses to the petitions filed on May 4, 2001. After a hearing on June 20, 2001, the court granted Naughton's application for a preliminary injunction, ordering Johnson to disclose all amounts received from Cota within three years of his death, to disclose the present holder or transferee of the funds, and to refrain from transferring, encumbering, or alienating the funds. World Savings Bank and Wells Fargo Bank were also ordered to hold and refrain from transferring any amounts which Johnson received from Cota within three years of his death.

The probate attorney's June 11, 2001 notes regarding Naughton's two petitions stated that certain matters needed to be "cleared" before the probate attorney could make a recommendation on the merits of the petitions. As to the petition concerning trust assets, the notes stated that a supplemental petition was required to identify the specific assets which Naughton claimed were trust assets and the assets which he alleged were acquired from Cota during his lifetime or following his death. As to the petition for recovery of property, the notes stated, among other things to be cleared, that Naughton must identify all funds and assets which stood in Cota's name during the last two years of his life which Naughton alleged were subject to administration in Cota's estate.

On July 19, 2001, Naughton filed a supplement to the petition concerning trust assets, which supplement is reflected in the court's register, and which supplement was apparently reviewed by the probate attorney in connection with a hearing on October 9, 2001. The probate notes for October 9, 2001, stated that the supplement to the petition did not cure the matters previously identified in the notes.

On July 19, 2001, Naughton also filed a supplement to the petition for recovery of property. The supplement, which is not reflected in the court's register, was stamped "filed" by the court and was stamped "received" by the probate department of the superior court. A conformed copy of the supplement is included in our record on appeal. The proof of service shows that Naughton served the supplement to the petition for recovery of property on Johnson and others in late June 2001. The supplement alleged that the La Mirada premises stood in Cota's name during the two-year period before his death and until it was deeded to Johnson and recorded in November 1999. Johnson filed a response to the supplement on November 20, 2001, and Wells Fargo Bank filed objections to the relief sought in the supplement on December 5, 2001.

The original filed supplement to the petition for recovery of property was apparently lost by the clerk's office, as the record indicates that it was not received by the probate attorney or the court in connection with hearings scheduled for October 9, December 18, and January 31, 2002. The probate attorney's notes for each of the scheduled hearings queried whether a supplement to the petition for recovery of property had been filed, and the notes for the latter two dates stated that there had been three continuances, "but notes still not cleared — why not?"

By the time of the January 31, 2002 hearing on the petition for recovery of property, the only two matters which the probate attorney requested to be cleared related to notice to Cheryl Johnson and to the identification of all funds and assets which stood in Cota's name during the last two years of his life. The probate attorney's recommendation for the January 31, 2002 hearing was to continue the matter to February 28, 2002, with no further continuances, for clearing of notes and filing of a supplement to the petition for recovery of property; otherwise, mediation or an evidentiary hearing was necessary.

At the January 31, 2002 hearing on the two petitions, Naughton's counsel stated that discovery was continuing and that the probate attorney's recommendation was for a continuance. The court responded that a continuance "was not going to happen" because the matter had been put over four times in the past and none of the defects on the petitions had been cleared up. The court stated, "When you get everything put together

and it's all clear, we'll be more than happy to run it through here, but it's just band-aiding it if we just keep putting it over every time. [¶] . . . [¶] . . . I'm going to deny them both without prejudice. You can get the discovery done and get all these notes cleared up and when you bring it back the next time, we should sail on through it." The court stated that its ruling would require re-service of the petitions.

Naughton filed a timely notice of appeal from the "order of the Court dated January 31, 2002, . . . dismissing the Petition [for recovery of property]." World Savings Bank and Wells Fargo Bank have filed respondent's briefs and contend, among other things, that the appeal should be dismissed because the denial without prejudice of the petition for recovery of property is not an appealable order.

DISCUSSION

A. The Order is Appealable

We agree with Naughton that the order is appealable pursuant to Probate Code section 1300, subdivision (k), and section 850, subdivision (a)(2)(D). (Unless otherwise specified, statutory references are to the Prob. Code.) Section 1300 provides in pertinent part: "In all proceedings governed by this code, an appeal may be taken from the making of, or the refusal to make, any of the following orders: [¶] . . . [¶] (k) Adjudicating the merits of a claim made under Part 19 (commencing with Section 850) of Division 2."

Section 850 provides in pertinent part: "(a) The following persons may file a petition requesting that the court make an order under this part: [¶] . . . [¶] (2) The personal representative or any interested person in any of the following cases: [¶] . . . [¶] (D) Where the decedent died having a claim to real or personal property, title to or possession of which is held by another."

The petition for recovery of property falls within the provisions of section 850, subdivision (a)(2)(D), because it alleges that Cota had a claim for undue influence against Johnson, and was brought by the special administrator and executor to recover money and to quiet title to real property held by others in favor of Cota's estate. The January 31, 2002 ruling, which denied the petition without prejudice, and which expressly required that Naughton again serve a petition to place the matter on calendar, constitutes the

refusal to make an order adjudicating the merits of the petition, and thus falls within the provisions of section 1300, subdivision (k). The order is appealable.[3]

B. Loss of Document by Clerk's Office Requires Reversal

Naughton's claim, based on *Datig v. Dove Books, Inc.* (1999) 73 Cal.App.4th 964 (*Datig*), that the trial court's ruling should be reversed because it was based on erroneous information concerning the filing of a document is not challenged by respondents.

In *Datig*, a demurrer was sustained and the plaintiff was granted until October 21, 1996, to file an amended complaint and a second amended complaint was filed on October 21. On October 23, the defendants obtained, by ex parte application and without any notice to plaintiff, an order of dismissal and entry of judgment based on the premise that the second amended complaint had not been timely filed. Defendants' counsel admitted that he received the second amended complaint on October 23, after returning from obtaining entry of the judgment. The plaintiff filed a motion to vacate the judgment on the ground, among others, that the judgment was entered as a result of defendants misleading the court into believing the second amended complaint had not been timely filed. The motion was continued to an unspecified date and was not rescheduled by the clerk. On December 23, 1996, plaintiff filed a notice of appeal. The Court of Appeal reversed the judgment on two grounds: (1) the trial court erred in granting defendants' ex parte application to dismiss the action with no notice to plaintiff and (2) defense counsel violated his duty as an officer of the court by, among other things, failing to stipulate to vacation of the judgment once he learned an amended complaint had been timely filed

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[3] Because we conclude that the order is appealable under the Probate Code, we need not address Naughton's contention that the order denying the petition is also appealable under Code of Civil Procedure section 904.1, subdivision (a)(6) because it was tantamount to an order dissolving the preliminary injunction. (See, e.g., *MaJor v. Miraverde Homeowners Assn*. (1992) 7 Cal.App.4th 618, 623 ["A preliminary injunction is an interim remedy designed to maintain the status quo pending a decision on the merits. . . . Thus, a cause of action must exist before injunctive relief may be granted."].)

and by opposing plaintiff's motion to vacate the judgment at a time when he was aware that a factual misrepresentation to the judge was the sole basis for entry of that judgment. (*Datig*, *supra*, 73 Cal.App.4th at pp. 978–980.) The court in *Datig* also acknowledged that a party can appeal from a judgment of dismissal without bringing a motion to vacate or set aside the judgment. (*Id*. at p. 979; see also *Gitmed v. General Motors Corp*. (1994) 26 Cal.App.4th 824, 829 [a party may appeal from a dismissal without first bringing a motion for relief under Code Civ. Proc. § 473].)

While Naughton concedes that the procedural posture and circumstances in *Datig* are distinguishable from those here (there was no lack of notice nor wrongdoing by defense counsel), Naughton requests that we apply that case by analogy to the circumstances here by distilling the principle that an order is properly reversed where it is based on an erroneous belief by the trial court that a pleading has not been filed. We agree with Naughton that the instant order should be reversed because it was based on the trial court's belief that Naughton had failed to attempt to clear the notes of the probate attorney. One of the notes dealt with the alleged failure of notice to Cheryl Johnson, and the other dealt with the alleged failure to file a supplement to the petition for recovery of property identifying the assets which stood in Cota's name during the last two years of his life and which Naughton sought to recover on behalf of Cota's estate.

Unknown to the probate attorney and the court, Naughton had filed a supplement to the petition for recovery of property. Because that supplement contained legal descriptions and clearly claimed that the La Mirada property was held by Cota within two years of his death, the trial court might have ruled differently (at least with respect to the claims regarding the La Mirada property) had it been aware of the supplement. A reversal under the instant circumstances is also consistent with the principle of extrinsic mistake. "One ground for equitable relief is extrinsic mistake — a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits. [Citations.] 'Extrinsic mistake is found when [among other things] . . . a mistake led a court to do what it never intended . . . .'" (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.) The doctrine of relief in equity from mistake has been applied where the

mistake is that of the clerk of the court. (*Id*. at p. 983, citing *Baske v. Burke* (1981) 125 Cal.App.3d 38, 44.) The apparent loss of the supplement to the petition for the recovery of property from the court file caused the court to act under a mistaken belief that no supplement had been filed and that Naughton had not attempted to clear the probate attorney's notes. This mistaken belief deprived Naughton of a hearing on the merits of his petition.

Respondents fault Naughton for failing to take any action over the course of several months when he knew from the probate notes of the defect in the court record (i.e., the apparently lost original filed supplement) and failed to take any action to correct it by bringing a conformed copy of the supplement to the attention of the probate attorney and the court. We can infer from our record that Naughton was content to abide by the probate attorney's recommendations for continuances of the matter from June 2001 to January 2002 because the parties were engaged in discovery. We can further infer that respondents also were content to have the matter continued because they too could have brought the supplement to the court's attention. Even as late as the January 31, 2002 hearing, the probate attorney was recommending one final continuance, to February 28, 2002, and there is no indication that such recommendation was opposed by anyone. And this was not a matter that would be ultimately determined on papers filed with the court, but, as the probate attorney's notes indicated, by mediation, and that failing, by a contested evidentiary hearing. Had the trial court been aware of the filing and service of the supplement, which may have met the probate attorney's concerns at least as to the La Mirada property, the court might not have denied the petition for recovery of property in its entirety.

Under the unique circumstances of this case, we believe that *Datig*, *supra*, 73 Cal.App.4th 964, and equitable principles require that the order be reversed.

DISPOSITION

The order is reversed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, J.

We concur:

SPENCER, P. J.

ORTEGA, J.